



## Agenda Report

21-716

Agenda Date: 7/13/2021

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### REPORT TO COUNCIL

#### SUBJECT

Action on Amendment No. 4 to the Agreement with Bates Group LLC for Calculation and Review of Employee Compensation under the Fair Labor Standards Act

#### COUNCIL PILLAR

Manage Strategically Our Workforce Capacity and Resources

#### BACKGROUND

In June 2016, the US Court of Appeals for the Ninth Circuit in the *Flores v. City of San Gabriel* case affirmed the district court's decision and held that the cash payments to employees for unused portions of the employees' benefits allowance must be included when calculating their regular rate of pay under the Fair Labor Standards Act (FLSA). This court decision changed the way employers are required to calculate regular rate of pay for purposes of calculating overtime under the FLSA. It requires employers to take into account cash in lieu payments when calculating overtime rates.

In October 2018, a FLSA complaint was filed against the City by five firefighters who alleged the City failed to pay them and other employees the proper overtime rates for more than four years. The City subsequently agreed to a settlement of \$2.7 million to pay all current and former employees entitled to FLSA overtime pay from May 2014 through August 2018.

In May 2019, the City entered into an agreement with Bates Group LLC (Bates), following a competitive procurement process, to assist staff in determining which employees were impacted by the settlement and to calculate back pay for those employees in accordance with the FLSA. Under the agreement, Bates performed an analysis for the period from May 2014 to August 2018 where they reviewed five different bargaining units to determine the pay types to be included in the regular rate of pay and calculated the amount due each employee for the period as a whole.

Since the agreement was executed, it has been amended three times. The first amendment increased the maximum compensation by \$25,120 for a revised not-to-exceed maximum compensation amount of \$100,000 to account for hours necessary to calculate the settlement amount that were over the initial estimate of hours needed. The second and third amendments extended the term to December 31, 2020 and December 31, 2021, respectively, to allow for Bates to answer subsequent questions if needed.

The purpose of this report is to request authorization to further increase the maximum compensation under the agreement and extend the term in order for Bates to calculate retroactive FLSA overtime wages that are necessary due to retroactive application for Memoranda of Understanding (MOU) increases that went into effect subsequent to bargaining units previous MOU expiration dates. Unlike the previous work Bates performed where they could analyze the entire period for all units at the

same time, the additional work requested will require Bates to analyze each unit more than once for all MOU periods that are beyond their previous agreement expiration date. This need will continue as long as there is a retroactive calculation necessary due to the timing of new MOU's becoming active subsequent the previous MOU expiration date.

City Administration strives to reach agreements on successor MOU's with the bargaining units prior to the expiration of the current MOU. Unfortunately, this may not always be possible. If the terms of any successor MOUs include provisions that provide any type of retroactive pay, the Administration is responsible for calculating those payments. Since this is currently not set up in the City's payroll system, it requires manual calculations which is labor intensive, especially when it requires a retroactive FLSA calculation. Consulting services will need to be utilized, if needed, while the City separately reviews and implements system enhancements to its payroll system that will automate this process.

## **DISCUSSION**

The *Flores* ruling changed how employers including the City calculate cash payments made in lieu of health benefits and other premium pays to employees when calculating overtime pay. As such, the City is required to continue to include cash in lieu payments in the overtime FLSA pay in each pay period. The overtime FLSA pay calculation is prepared manually for each qualifying employee in each work week of a pay period. This is for non-exempt employees with active MOUs. If the MOU term expired and the final negotiated MOU provides for a retroactive payment, then staff is required to go back to every non-exempt employee in the respective union group to calculate the overtime FLSA owed each work week to all the employees. The retroactive payments require significant amount of time to analyze because staff has to manually go back to all the work weeks and review each employee's timecards again to determine if additional overtime FLSA is owed. Existing City staff does not have the capacity to do this level of analysis.

Staff is requesting authority to execute Amendment No. 4 to the agreement in order for Bates to calculate retroactive FLSA overtime wages for the potentially affected employees in FLSA eligible bargaining units. Amendment No. 4 increases compensation by \$189,450 for a revised not-to-exceed maximum compensation amount of \$289,450 and extends the term through April 30, 2024 for a total of five years. Bates will be paid on a time and materials basis in accordance with the rates established in the agreement and will be required to provide the City with an estimate prior to commencing work.

The increased amount reflects the estimated number of MOUs affected and the corresponding cost for the additional retroactive FLSA calculations. The actual number of additional retroactive FLSA calculations will depend on how many MOUs with retroactive payments, how many employees are relevant to the analysis, how many months the retroactive pay covers, and how many stipends/specials pay are involved.

Bates has already performed the initial tasks of meeting with staff and reviewing the City's payroll data, documents, systems and MOUs, and therefore is able to continue this service with little disruption in calculating payments owed to employees, saves costs of ramp up time for new consultants, and, in turn, saves public funds for the City for calculating the retroactive FLSA payments for additional pay periods.

Moreover, the contract extension will give staff the time to assess the feasibility of reconfiguring the

payroll system in order for the calculations to be done automatically. In the event a consultant is still required to calculate FLSA payments after the contract extension, staff will then conduct a competitive process.

### **ENVIRONMENTAL REVIEW**

The action being considered does not constitute a "project" within the meaning of a California Environmental Quality Act ("CEQA") pursuant to the CEQA Guidelines section 15378(a) as it has no potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment. Furthermore, the action being considered does not constitute a "project" within the meaning of the California Environmental Quality Act ("CEQA") pursuant to CEQA Guidelines section 15378(b)(5) in that it is a governmental organizational or administrative activity that will not result in direct or indirect changes in the environment.

### **FISCAL IMPACT**

The current agreement with Bates expires on December 31, 2021 and has a not-to-exceed compensation of \$100,000. Under Amendment 4, the term of the agreement would be extended through April 30, 2024, and the proposed not-to-exceed compensation would be increased by \$189,450, bringing the total not-to-exceed compensation amount to \$289,450, subject to budget appropriation. These costs were included in the Proposed FY 2021/22 and FY 2022/23 Operating Budgets.

### **COORDINATION**

This report has been coordinated with the City Attorney's Office.

### **PUBLIC CONTACT**

Public contact was made by posting the Council agenda on the City's official-notice bulletin board outside City Hall Council Chambers. A complete agenda packet is available on the City's website and in the City Clerk's Office at least 72 hours prior to a Regular Meeting and 24 hours prior to a Special Meeting. A hard copy of any agenda report may be requested by contacting the City Clerk's Office at (408) 615-2220, email [clerk@santaclaraca.gov](mailto:clerk@santaclaraca.gov) <<mailto:clerk@santaclaraca.gov>>.

### **RECOMMENDATION**

Authorize the City Manager to execute Amendment No. 4 to the Agreement with Bates Group LLC for Calculation and Review of Employee Compensation under the Fair Labor Standards Act, to extend the term of the agreement through April 30, 2024 and increase compensation by \$189,450 for a revised not-to-exceed maximum compensation of \$289,450, subject to the appropriation of funds.

Reviewed by: Kenn Lee, Director of Finance

Approved by: Deanna J. Santana, City Manager

### **ATTACHMENTS**

1. Original Agreement with Bates Group LLC
2. Amendment No. 1 to the Agreement for Services with Bates Group LLC
3. Amendment No. 2 to the Agreement for Services with Bates Group LLC
4. Amendment No. 3 to the Agreement for Services with Bates Group LLC
5. Amendment No. 4 to the Agreement for Services with Bates Group LLC